

DEPARTMENT OF SOCIAL SERVICES

744 P Street, Sacramento, California 95814



June 17, 2002

ALL-COUNTY INFORMATION NOTICE NO. I 42-02

TO: ALL COUNTY WELFARE DIRECTORS
IHSS PROGRAM MANAGERS**REASON FOR THIS TRANSMITTAL**

- ☐ State Law Change
- ☐ Federal Law or Regulation Change
- ☐ Court Order
- ☒ Clarification Requested by One or More Counties
- ☐ Initiated by CDSS

SUBJECT: ASSEMBLY BILL 1682 (AB 1682), CHAPTER 90, STATUTES OF 1999
ADDITIONAL IMPLEMENTATION QUESTIONS RAISED BY COUNTIES

REFERENCE: ACIN I-27-02; ACL 98-20, ACL 99-62, ACL 00-36; ACL 00-68

In recent months counties have submitted a number of questions regarding the implementation requirements of AB 1682. ACIN I-27-02 provides answers to questions specifically relating to the implementation timeline. The following information responds to additional questions that have been raised. Where indicated, these or similar questions have been previously answered.

AB 1682 – FREQUENTLY ASKED QUESTIONS**SECTION I: LIABILITY****SECTION II: “EMPLOYER OF RECORD”****SECTION III: REGIONAL AGREEMENTS****SECTION IV: EMPLOYER - EMPLOYEE RELATIONS****SECTION V: PUBLIC AUTHORITY****SECTION VI: COUNTY ACTING AS “EMPLOYER OF RECORD”****SECTION VII: GENERAL**

SECTION I: LIABILITY

1. **Question:** Would the county be deemed to be the employer of In-Home Supportive Services (IHSS) providers referred to recipients for the purposes of liability due to the negligence or intentional torts of the IHSS providers?

Answer: The statute governing Public Authorities (PAs) and Non-Profit Consortia (NPCs) does provide some limited statutory immunity for the counties, the PAs and NPCs. Welfare and Institutions (WIC §12301.6(f)). These provisions could influence a county's decision in selecting the modes and methods that it chooses for IHSS service delivery. The three specific protections offered by the statute are as follows at WIC §12301.6(f):

- (1) Any nonprofit consortium contracting with a county pursuant to this section or any public authority created pursuant to this section shall be deemed not to be the employer of in-home supportive services personnel referred to recipients under this section for purposes of liability due to the negligence or intentional torts of the in-home supportive services personnel.
- (2) In no case shall a nonprofit consortium contracting with a county pursuant to this section or any public authority created pursuant to this section be held liable for action or omission of any in-home supportive services personnel whom the nonprofit consortium or public authority did not list on its registry or otherwise refer to a recipient.
- (3) Counties and the state shall be immune from any liability resulting from their implementation of this section in the administration of the In-Home Supportive Services Program. Any obligation of the public authority or consortium pursuant to this section, whether statutory, contractual, or otherwise, shall be the obligation solely of the public authority or nonprofit consortium, and shall not be the obligation of the county or state.

Each county must obtain its own legal advice concerning the county's exposure to risk under this program. See also ACL 00-36, question 28.

SECTION II: "EMPLOYER OF RECORD"

2. **Question:** Please clarify the term "Employer of Record."

Answer: "Employer of Record" is a term that has never been used in the Statutes or Regulations governing the IHSS program. It has been used as a term of convenience to represent the obligation created under AB 1682 requiring each county to act as, or establish, an employer of IHSS providers by January 1, 2003 for purposes of the Meyers-Milias-Brown Act (Government Code § 3500 *et. seq.*). The term "Employer of Record" is used as a shorthand reference to any entity, whether the county or another entity, that the county designates to act as the entity with whom representatives of IHSS providers can interact. See also ACL 00-36, question 12.

3. **Question:** Does the language of the first sentence of WIC §12302.25 “...and other applicable state or federal law” apply narrowly to collective bargaining law, or broadly to mean that whoever is the employer for collective bargaining purposes is the employer for all purposes?

Answer: Since the primary statutory reference in AB 1682 refers to the California Meyers- Miliias- Brown Act (Gov. Code § 3500 *et seq.*), which governs public sector employer - employee relations, we interpret the referenced statutory language as applying narrowly to other state or federal law relating to public employer - employee relations, including collective bargaining. Counties should consult with their county counsels regarding this issue.

SECTION III: REGIONAL AGREEMENTS

4. **Question:** If the counties share a PA, would one Board of Supervisors handle all the counties? Do the collaborating counties need a governing body for the PA created pursuant to a joint agreement separate from the Board of Supervisors of each county?

Answer:

The statute states at WIC §12301.6(b)(3)(A) “As an alternative, the enabling ordinance may designate the board of supervisors as the governing body of the public authority.” It is difficult to reconcile how one board of supervisors can be identified from among multiple participating counties to make this option work. On the other hand, it appears that the counties could choose to create a stand-alone governing body.

Since there is no express prohibition against counties entering into regional agreements to share a PA pursuant to WIC § 12302.25, the Department is not inclined to prohibit this approach. Sharing a PA among counties would be premised upon the counties establishing a regional agreement. All of the requirements for a PA would still have to be met. For example, the counties would still have to create a governing body for the PA that meets all the composition requirements of WIC §12301.6. Since more than one county would be involved in the establishment of the governing body, the composition of the governing body would be established, or the process for selecting a governing body would be established under the regional agreement. Each participating county would still be required to meet the composition requirements for its own IHSS advisory committee. Each county would be also be subject to the requirement that they choose their method and mode of service only after advice and recommendations from its own IHSS advisory committee. See also ACL 00-36, question 23 and ACL 00-68, question 23.

5. **Question:** Does the State have any ideas on how counties can collaborate and how to do the governance of the employer of record in a joint effort?

Answer: We strongly encourage counties to consider collaborative arrangements to meet the responsibilities and costs of implementing AB 1682. For example, it

appears that counties can enter into regional agreements to share a PA. Counties could also leverage their combined caseload volumes to encourage contract proposals and better contract rates from home care firms for a multi-county area. Another concept might be for a group of counties to look at the legality of creating an independent nonprofit public corporation that would operate like a business, hire providers and then contract back with the counties in the contract mode. As with other aspects of this process, each county should consult with its county counsel.

6. **Question:** How can negotiations for wages and benefits be conducted under a joint agreement? Would there be different negotiations with each county?

Answer: There could be separate wage and benefit negotiations conducted for each county but there is no required approach to this. We do not know of anything that would prevent the counties from authorizing their negotiators to negotiate collectively for all participating counties or individually on behalf of each county. See also ACL 00-36, questions 23 and 27.

7. **Question:** Under a regional agreement, would the IHSS wages be different for each county, since the Board of Supervisors must approve the budget for its own IHSS wages?

Answer: IHSS wages could be different for each county. Regardless of whether the collectively bargained wages are the same or different for every county participating in a regional agreement, each county's Board of Supervisors is independently responsible for approval of the applicable wage for its own county. See also ACL 00-36, question 23.

SECTION IV: EMPLOYER - EMPLOYEE RELATIONSHIPS

8. **Question:** What is the timeline for establishing an Employer - Employee Relation's Policy (EERP)?

Answer: We do not believe that there is an express statutory or regulatory requirement that an employer, under Government Code § 3500 et. seq., have a written employer-employee relations policy. However, Govt. Code § 3507 speaks to the timing of the adoption of such a policy by requiring that it can only be adopted after consultation in good faith with representatives of an employee organization. ACL 98-20 provides a model Employer - employee Relations Policy for PAs. It explicitly states that PAs and NPCs "may adopt, reject or modify the policy in part or in its entirety for purposes of collective bargaining." The Manual of Policies and Procedures (MPP) 30-767.241 makes the same statement.

9. **Question:** Can the EERP be adopted and/or in effect prior to California Department of Social Services (CDSS) rate approval of the PA?

Answer: CDSS and Department of Health Services (DHS) rate approval does not legally regulate the timing of the adoption of an EERP. The adoption of rules and regulations governing employer-employee relations with IHSS providers and their elected representative(s) is a matter governed by the Meyer, Milias, Brown Act. We defer to your county counsel and county labor relations specialist on such questions. See also ACIN I-27-02, question 5.

SECTION V: PUBLIC AUTHORITY

10. **Question:** In a PA mode, can a county designate one of its departments to run the PA?

Answer: A PA is a legally established local agency. ACL 98-20 explicitly states that a PA or a NPC may not duplicate any activities or services of the county. We have advised counties that AB 1682 does not appear to preclude a PA from contracting with county agencies for services. It is unclear to us, however, how one county agency can “run” a separate independent local agency. Counties should consult their county counsels.

11. **Question:** What is meant by the language in WIC §12301.6(b)(2)(B) that “employees of the Public Authority (PA) shall not be county employees for any purpose?”

Answer: To the extent that this answer is inconsistent with previous answers provided to individual counties, this answer supercedes all previous answers.

As we have stated in our response to question 12 below, some counties have allowed their PAs to contract with the county for county staff services. We now believe that the statutory language was not intended to prohibit an individual from holding a job with the county and holding another job with the PA.

Rather, given the immunity provisions included in WIC § 12301.6, we believe it is reasonable to interpret the language that “[e]mployees of the public authority shall not be employees of the county for any purpose” to mean that for any purpose, including employer liability, an employee’s actions done during the course and scope of their employment for the PA shall not be construed to be acts of the employee as an employee of the county in any capacity. See also MPP 30-767.211.

We believe this statutory language clarifies and emphasizes the fact that the PA is an entity that is legally separate and distinct from the county. Each county should consult with its county counsel in assessing the legal issues associated with this question. In particular, counties should consult with their county counsels to determine whether dual employment would conflict with their county conflict of interest codes.

12. **Question:** Can the PA contract with the county to provide staff for the PA?

Answer: Yes. Some counties have allowed PAs to contract with the county for the full-time, dedicated services of county staff, i.e., county staff contracted to the

PA have been fully dedicated to the business of the PA and have had no county duties, although this would not be prohibited. The county employee could dedicate part-time to the county and part-time to the PA, as long as the agreement between the county and the PA properly defines the relationship. Additionally, the law does not appear to preclude a PA from contracting with a county for support services, such as accounting, or payroll. We suggest you discuss these issues with your county counsel.

13. Question: Can the Executive Director be a county employee?

Answer: As explained in questions 11 and 12 above, this is not prohibited by 12301.6(b)(2)(B). However, counties should consult with their counsel to determine what risks the county may incur by allowing a county employee to act as the Executive Director of a PA.

14. Question: Can the PA have a dual track reporting hierarchy, i.e. both Board of Supervisors and Health and Human Services?

Answer: We defer to your county counsel on the rules of local agency formation.

15. Question: What type of training is required for an IP to be able to be on the registry?

Answer: No type of training is required for an IP to be able to be on the registry. Prior to placing a prospective provider on the registry, the only requirements are “proof of identification, including but not limited to, a positive photograph identification from a government source.” W&IC 12306.5(b)

Additionally, as a separate function, WIC § 12301.6 requires established PAs or NPCs to conduct a background check on IHSS providers. See also ACL 00-36, question 5.

16. Question: What happens if a recipient elects not to hire a provider that is on the registry?

Answer: The recipient may request additional referrals from the registry until a suitable provider is found or may independently seek their own provider.

17. Question: If the provider is not hired off the registry, does the PA have any responsibility for the work conditions?

Answer: In those cases where IHSS recipients hire IHSS providers that were not referred to the IHSS recipients by a PA, the IHSS providers shall be referred to the PA (or NPC) for the purposes of wages, benefits, and other terms and conditions of employment. (WIC § 12301.6 (h).) Counties should consult with their county counsels.

18. **Question:** When does a PA exist?

Answer: A PA exists when the following criteria are met: 1) The County Board of Supervisors enacts an ordinance creating the PA, and 2) the PA has direct costs that can be claimed to the State, meaning that it has operations costs, 3) the PA's State approved rate takes effect, and 4) The PA has complied with all other requirements to become a legal entity, such as registration with the Secretary of State. It is important for counties to remember that in order to have their PA rate effective on 1/1/03, they must submit their rate approval documents by no later than 11/29/02. Failure to do so could result in non-state participation for costs incurred prior to PA rate approval. Please refer to ACIN 1-27-02 for additional information on the timeline issues for compliance with AB 1682. Please also refer to ACL 98-20 for additional information on the PA creation and operation process.

SECTION VI: COUNTY AS "EMPLOYER OF RECORD"

19. **Question:** If the county chooses to administer the IP mode of IHSS service delivery pursuant to W&I C §12302.25 and thereby acts as the employer of IHSS providers for employer - employee relations purposes, who would be considered the employer for all other purposes, the recipient, provider, or the county?

Answer: The County can act as employer of IHSS providers for employer - employee relations purposes only and satisfy AB 1682. We are unaware of any other change in employer - employee relationships as a result of AB 1682. Counties should consult with their county counsels for further information about who would be the employer for purposes other than AB 1682 purposes.

20. **Question:** Would the county have additional obligations to the IHSS IPs under the county administration of the IP mode when fulfilling the requirements created by AB 1682?

Answer: The obligation of the county added by AB 1682 is to either act as, or establish, an employer for the purposes of the Meyers-Milias-Brown Act (Govt. Code § 3500 *et seq.*).

Under State law, the CDSS is required to perform or assure the performance of "all rights, duties and obligations of the recipient relating to such services as required for purposes of unemployment compensation, unemployment compensation disability benefits, workers' compensation, federal and state income tax, and federal old-age survivors and disability insurance benefits." (WIC §12302.2.) We are unaware of any other change in employer - employee relationships as a result of AB 1682.

21. **Question:** Must the county perform the same minimum functions as prescribed for an NPC or a PA established pursuant to Section 12301.6 (e)(1-6). What are the minimum functions, if any?

Answer: No. The minimum functions of a county acting as the AB 1682 employer are to carry out the responsibilities set forth in the Meyers- Miliias- Brown Act (Govt. Code § 3500 *et seq.*) and any other applicable state or federal laws that govern public employer - employee relations. See also ACL 00-36, Questions 13 and 14.

22. **Question:** Are there any express or implied limitations of liability for the county in its administration of the IHSS program, should it adopt county administration of the IP mode of service?

Answer: Counties should consult with their county counsels regarding this question. Please refer to Question 1 above.

23. **Question:** Would the IP's be entitled to any additional rights or benefits (other than collective bargaining rights) under any specific method or mode of service?

Answer: There are potential benefits bestowed by the legislature on the IPs who are employed pursuant to a PA or an NPC under the IP mode of service delivery. The State participation in wages and benefits is currently higher for IPs under PAs or NPCs, than for providers under the county administration of the IP mode.

SECTION VII: GENERAL

24. **Question:** Can PA Advisory Committee members serve on the IHSS Advisory Committee?

Answer: Yes. However, the general scheme created by the statutes is for the State to participate in funding only one Advisory Committee. The statutes, when read as a whole, indicate that each county will only have one Advisory Committee to meet the Advisory Committee requirements of AB 1682. Those few counties that had PAs before the passage of AB 1682 met the AB 1682 Advisory Committee requirement by meeting the PA requirements of WIC §12301.6(b) prior to July 1, 2000. All other counties must form an IHSS Advisory Committee as required by WIC §12301.3. If a county were to choose to create a separate IHSS Advisory Committee under WIC §12301.3 and a PA Advisory Committee under WIC §12301.6, the State will fund only one Advisory Committee (WIC § 12301.4). There is no Statutory requirement for the counties to maintain both committees.

25. **Question:** Please provide an update on the experience of other counties who have chosen to comply with AB 1682 through a method other than a PA?

Answer: Some of this information is just now emerging. Tuolumne county may choose to act as the employer for purposes of AB 1682. Our AB 1682 implementation status information shows some counties to be considering several options, including mixed mode options: for example, Butte (contract [C]), Fresno (C & PA), Kern (C & PA), Lake (PA & Homemaker [H]), Solano (PA & C), Calaveras

(H). Existing mixed mode (C & PA) counties are: San Diego, San Francisco, Santa Clara, San Mateo and Santa Cruz. It is suggested that the counties be contacted directly for information. We expect to get additional information on this as time passes. See also ACL 00-36, Question 27.

26. **Question:** What are the plans for evaluating the new model of employing providers?

Answer: We have no plans at this time. We have received no funding to evaluate the “new model” of employing providers. See also ACL 00-36, Question 21.

27. **Question:** Have any studies been done yet?

Answer: Not to our knowledge although some PA’s have done their own internal assessments. Our CDSS, Adult Programs Branch, Evaluation and Integrity Unit has just completed its first PA review. See also ACL 00-36, Questions 20 and 21.

If you have any questions regarding this letter, please contact Alan Stelmack, Chief, Adult Programs Branch at (916) 229-4582.

Sincerely,

*Original signed by DONNA L. MANDELSTAM
Signed on June 17, 2002*

DONNA L. MANDELSTAM
Deputy Director
Disability and Adult Programs Division